No. 15871

In the United States Court of Appeals for the Ninth Circuit

CLARENCE A. KOLSTAD and ALTA A. KOLSTAD,
APPELLANTS,

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

BRIEF FOR THE UNITED STATES, APPELLEE

PERRY W. MORTON,
Assistant Attorney General.
KREST CYR,
United States Attorney,
Billings, Montana.
ROGER P. MARQUIS,
ELIZABETH DUDLEY,
Attorneys, Department of Justice,
Washington 25, D. C.

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OPINION BELOW

The district court did not write an opinion. Its views are set forth in its order denying motion to set aside the judgment (R. 52-61).

JURISDICTION

This is an appeal from the deficiency judgment entered January 28, 1957 (R. 24-27), and the final judgment entered March 8, 1957 (R. 28-32), and the order denying the motion to set aside judgment entered December 6, 1957 (R. 52-61). Notices of appeal were filed April 18, 1957 (R. 32), April 22, 1957 (R. 32-33), and January 2, 1958 (R. 62). The jurisdiction

of the district court was invoked by the United States under various Acts of Congress authorizing this condemnation proceeding, specified in the complaint (R. 3-4), including the Act of August 1, 1888, 25 Stat. 357, 40 U.S.C. 257, and the Act of June 17, 1902, 32 Stat. 388, 43 U.S.C. 371; also Sec. 2 of Reorganization Plan No. 3 of 1950, 15 F.R. 3174, and Sec. 28 of Order No. 2509, as amended 17 F. R. 6794. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1291.

QUESTIONS PRESENTED

1. Whether, in a condemnation proceeding in which a number of parcels of land are severally-owned, the value of each parcel should be assessed separately, when they are farmed as a unit.

2. Whether a trial court's ruling on a motion to set aside a judgment is reviewable when no abuse of discretion is shown.

3. Whether, in ruling on a motion under Rule 60(b), F.R.Civ.P., on the ground of newly discovered evidence, the trial court should set aside a judgment when the evidence could have been produced at the time of the trial.

4. Whether a trial court's ruling that severally-owned parcels should be valued separately should be reversed when the landowners fail to make an offer of proof as to the valuation of the parcels as a unit.

STATEMENT

On May 4, 1955, the United States instituted condemnation proceedings for the acquisition of the fee title to certain lands in Toole and Liberty Counties, Montana, for use in connection with the Tiber Dam and Reservoir, Lower Marias Unit, Missouri River

Basin Project, which is a reclamation project. The proceeding involved land under several ownerships, but only Parcels No. 10, containing about 8,886.79 acres, and No. 11, containing about 320 acres, as described in the complaint and the declaration of taking, are here involved (R. 3-15, 147).

On December 12, 1956, a trial before a jury commenced for the determination of just compensation. Mr. Kolstad testified that the property taken was a part of a 17,400 acre ranch owned and operated by him and his wife, Alta A. Kolstad (R. 104-108). However, when he stated that the ranch was composed of three separate parcels, the title to one being in his name, another in his wife's name, and the third in their joint names, the court raised the question of running into a problem of separate ownerships (R. 121-122). Counsel for the appellants argued that the case should be tried as though there were a unity of ownership, since the property was owned by a husband and wife and operated as one unit, and partnership income tax returns were made. It was the court's opinion that compensation for the portions of the three tracts included in the two parcels described by the Government with severance damages in each instance must be separately determined, but that they could be consolidated for trial. However, the court agreed to continue the trial and withhold its ruling until counsel for appellants could submit a brief supporting his argument (R. 122-144). No brief was filed (R. 48), and on January 17, 1957, the trial was resumed (R. 146).

Mr. Kolstad described the ranch as typical land along the Marias and Missouri Rivers, some of which was

irrigated and some was subirrigated from the river bed. The property was used principally for raising winter wheat and cattle, and was improved by buildings suitable for those purposes (R. 112-117, 156-158). He testified that the production of wheat had been consistent, and over the past seven or eight years he had averaged 22 bushels on the seeded acres, which means that one-half of that amount, or 11 bushels per cultivated acre would be the average, because of summer fallowing. He stated further that because of his long residence in this vicinity he knew the market value of lands, and was familiar with the sales which had taken place (R. 168-170, 175, 244). However, in each instance, his valuation was considerably higher than the valuations of the two expert appraisers presented by him.

In addition to Mr. Kolstad, two real estate appraisers testified as to value on behalf of appellants (R. 300-306, 378-382). The Government presented four witnesses who were experienced appraisers (R. 419-423, 439-441, 475-477, 504-507). These seven witnesses used the same method in arriving at their valuations. They classified the land, i.e., plowed land, tillable land, grazing land, bottom land, etc., and valued the acreage included in each classification in accordance with their opinions as to the market value thereof. All of these witnesses stated that there had been very few sales of land in the vicinity in recent years, but considered a few they believed to be comparable (R. 168, 385, 401, 423-424, 442, 481-489, 508-509). They valued each of the three tracts here involved before the taking, and valued the remaining acreage after the taking, the difference in the two figures representing the dam-

age. The following valuations and verdicts, including severance damages, were given:

Clarence A. Kolstad Tract

Original acreage..... 5,180.7
Remaining acreage... 1,400.7

Taken..... 3,780.0 acres (R. 177, 193–194)

Landowner's Witnesses	*Government's Witnesses*	*Verdict*
$339,979.30 (R. 176, 183–194)	$227,000.00 (R. 518–519)	$232,730.00 (R. 25)
307,000.00 (R. 392)	198,898.62 (R. 425–427)	
305,200.00 (R. 332–333)	194,433.88 (R. 443–454)	
	155,609.10 (R. 483–484)	

Alta A. Kolstad Tract

Original acreage..... 4,699.87
Remaining acreage... 2,868.59

Taken..... 1,831.28 acres (R. 209, 222)

Landowner's Witnesses	*Government's Witnesses*	*Verdict*
$160,497.90 (R. 211–222)	$ 89,600.00 (R. 522–523)	$ 96,992.00 (R. 26)
127,000.00 (R. 397)	75,450.31 (R. 427–428)	
125,850.00 (R. 334–335)	73,173.95 (R. 445–447)	
	59,700.98 (R. 485–487)	

Clarence A. and Alta A. Kolstad Tract

Original acreage..... 7,423.00
Remaining acreage... 3,903.00

Taken..... 3,520.00 acres (R. 237)

Landowners' Witnesses	*Government's Witnesses*	*Verdict*
$278,717.15 (R. 228–237)	$179,100.00 (R. 524–528)	$191,024.00 (R. 25)
186,500.00 (R. 400)	131,489.77 (R. 428–429)	
183,800.00 (R. 338–339)	126,302.75 (R. 447–448)	
	102,597.90 (R. 487–488)	

Joe Meissner, who was a witness presented by the Government, testified that he and his brothers leased the entire Kolstad ranch from 1948 through 1953. He stated the average yield of wheat for each of the years, varying from 13 to 24 bushels per acre, giving an average for the six years of 16½ bushels (R. 455-461). On cross-examination, counsel sought to discredit his testimony by questions as to records from which he obtained the yields for the various years (R. 464-498), but offered no rebuttal. This witness also testified that in 1956 he purchased 3,136 acres of land which is very much the

same type as the Kolstad property, about the same terrain, a little more level and larger blocks. There were 2,700 acres of tillable land at $40 per acre, and the balance was grazing land at $10 per acre (R. 461-464).

On January 28, 1957, a deficiency judgement in accordance with the jury verdict was entered (R. 24-27), and on March 8, 1957, a final judgment was entered (R. 28-32). Notices of appeal were filed (R. 32-33).

On November 4, 1947, appellants filed a motion to set aside the judgment, on the ground that "the case was tried on the theory of three separate ownerships when in truth and in fact, the property was owned by these defendants as tenants in partnership; that through surprise, mistake and excusable neglect," they were unable to show this ownership, and on the further ground that they had discovered new evidence (R. 34-35). The motion was supported by the affiavit of C.A. Kolstad (R. 35-47). The Government opposed the motion on the groud that the supporting affidavit of appellant does nothing more than show there was a single operation on the separate parcels, which at all times had been recognized by both parties and the court, and on the further ground that the evidence appellants claimed as "newly discovered" was known to them and could have been produced at the time of the trial (R. 47-52). On December 6, 1957, the motion was denied and the court filed an order fully stating its views and giving authorities for its holdings in accordance with the Government's grounds for opposing the motion (R. 52-61). This appeal followed (R. 62).

ARGUMENT

I

The District Court Correctly Ruled That Where Severally-Owned Tracts of Land Are Condemned in One Proceeding, the Value of Each Tract Should Be Assessed Separately

When the trial of this case commenced, it was the impression of the court that the three parcels of land involved were in one ownership (R. 122-123). However, when the court learned that they were separately owned it correctly held that they could not be valued as one tract, as contended by appellants. In *United States* v. *Runner,* 174 F. 2d 651 (C.A. 10, 1949), in reversing a judgment on a 200-acre tract of land which had been valued as a unit when it was not jointly owned but was broken into four parcels, owned by different individuals, the court stated (p. 652):

> Ownership in the land being several, causes of action for just compensation were of course separate and several, and although the causes of action may have been permissibly consolidated for trial convenience, See Rules 18 and 20, F.R.C.P., 28 U.S.C.A., a joint or collective judgment on the several causes of action would be improper and objectionable. *Kohl et al.* v. *United States,* 91 U.S. 367, 23 L. Ed. 449; *Olympia Light & Power Co.* v. *Harris,* 58 Wash. 410, 108 P. 940; *Rudacille* v. *State Commission on Conservation,* 155 Va. 808, 156 S.E. 829; Lewis on Eminent Domain, 3rd Ed., Sec. 767, p. 1369. It follows as a necessary corollary that in the discharge of its corresponding obligation to pay just compensation, the Government is entitled to have the value of severally owned tracts separately

assessed. The situation is quite different where more than one person owns or claims a joint or undivided interest in condemned land. *Meadows* v. *United States,* 4 Cir., 144 F. 2d 751; *Carlock* v. *United States,* 60 App. D.C. 314, 53 F. 2d 926; *United States* v. *25.936 Acres of Land,* 3 Cir., 153 F. 2d 277.

In the *Runner* case, the four parcels were not used as a unit, but the same rule applies where separately owned parcels are so used. The district court had ample authority for so holding (R. 57-60). The state cases on which it relied are directly in point. In two of them, *Glendenning* v. *Stahley,* 173 Ind. 674, 91 N.E. 234 (1909), and *McIntyre* v. *Board of County Com'rs.,* 168 Kan. 115, 211 P. 2d 59 (1949), separate parcels of land were owned by husbands and wives and farmed as units, as in the present case. In *Duggan* v. *State,* 214 Iowa 230, 242 N.W. 98 (1932), one tract was owned by a brother and sister jointly, and the other tract was owned by the sister alone, and farmed as a unit. The Supreme Court of Tennessee also followed this rule in *Tillman* v. *Lewisburg & N. R. Co.,* 133 Tenn. 554, 182 S.W. 597 (1915), where a wife sought damages to a parcel of land owned by her and used in connection with a parcel owned by her and her husband as tenants by the entirety, over which a right-of-way was condemned. The reason for this rule is that "claims for damages in proceedings of this character are personal, and must be asserted in the name of the actual owners affected. One person may not recover damages sustained by another, * * *." *Glendenning* v. *Stahley, supra,* p. 684.

The theory of compensation in eminent domain cases is that the owner is to be compensated fully for all land

taken from him, including the diminution in value of that remaining owned by him, but full compensation does not include diminution in the value of the remainder caused by the acquisition and use of adjoining lands of others for the same undertaking. *Campbell* v. *United States,* 266 U.S. 368, 372 (1924); *McIntyre* v. *Board of County Com'rs.,* 168 Kan. 115, 211 P. 2d 59, 64 (1949); *State* v. *Superior Court for Spokane County,* 10 Wash. 2d 362, 116 P. 2d 752 (1941); 18 Am. Jur., Eminent Domain, sec. 271, p. 912. It is thus clear that the district court correctly ruled that the three parcels must be valued separately, so that the severance damages could be determined to the individual parcels, and followed the ruling of this Court that "in condemnation of part of a tract owned in fee simple, just compensation is the market value of the tract as a whole, before condemnation, less the market value of the portion which remains after the taking of the part. The rule applies exclusively to condemnation of fee simple title of a tract in one ownership." *United States* v. *Honolulu Plantation Co.,* 182 F. 2d 172, 175 (1950), cert. den. 340 U.S. 820.

Appellants were given an opportunity to submit a brief to the trial court when the question arose as to the separate ownerships, the court stating that if it was wrong in holding that the parcels should be valued separately it would change its ruling. Counsel then asked the court if it ruled against him, must he not then "preserve rights by making an offer of proof?" The court replied: "That is just exactly right"[1] (R.

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[1] This is contrary to Mr. Kolstad's allegation in his affidavit that he was foreclosed from making an offer of proof as to partnership ownership of all of the lands involved (R. 41).

142-143). No brief was submitted, and appellants were given from December 13, 1956, until January 17, 1957, more than a month, within which to show the ownership of the property. When the trial resumed, no offer of proof was made of the ownership by a partnership. At this point appellant's counsel expressed no objection to the court's ruling and proceeded to try the case on the separate tract basis.

Counsel never in the language of Rule 46, F.R.Civ.P., made "known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor." The objection originally made in December was on this record plainly not preserved, since no brief was submitted and no further reference was made to the matter when the trial was resumed. And no offer of proof was made either as to single partnership ownership of all the lands, or as to the difference that might be reached when the property is valued separately or as a whole. The situation here is comparable to that in *Ruud* v. *United States,* 256 F. 2d 460 (C.A. 9, 1958), cert. den. October 13, 1958, where by failing to produce authorities in a similar action, the counsel led the court to believe he was not pursuing the matter. Here, it is perfectly clear that the court had not made a definitive ruling, and at the time of recess when he invited the filing of a brief he said: "* * * and I'll notify you just as quickly as I can what my position is, if there is any change in it" (R. 144). Counsel's failure to file a brief naturally would be understood as indicating that he was unable to find authorities to support his position, and his subsequent conduct tended to confirm that understanding.

But even if appellants had then submitted the state-

ments made by Mr. Kolstad in his affidavit 11 months later as to a joint bank account and the filing of partnership income tax returns (R. 36-45), it is submitted that was not sufficient to prove the existence of a legal partnership.[2] In passing upon the relationship of parties, one of which claimed it to be a partnership and the other a joint venture, the Supreme Court of Montana in *Ivins* v. *Hardy,* 120 Mont. 35, 179 P. 2d 745 (1947), did not find that the filing of partnership income tax returns for a number of years constituted the relationship a partnership. In an agreement to purchase a tract of real estate, those two individuals were named as the purchasers and the agreement contained no suggestion that they were purchasing as a partnership. The court stated (p. 749):

> Our view is that at least prima facie the relationship of the parties in this case was that of tenants in common at the inception of their dealings and that if that relationship was changed to one of partnership or joint adventure in the real estate, it was because of the agreement made for the operation of the property. That agreement, we hold, was referable to the relation of tenants in common and did

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[2] Sec. 63-107, Revised Codes of Montana 1947, provides:

> Rules for determining the existence of a partnership. In determining whether a partnership exists, these rules shall apply:
>
> * * * (2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.
>
> (3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

not serve to change the relationship so far as the ownership of the real estate was concerned. They still held it as tenants in common. Nor do we think the result is affected by the fact that at least a part of the purchase price of the property was hoped to be paid out of earnings arising from the joint operations.

In the absence of proof that the property was owned by a legal partnership, it is clear that the district court correctly ruled that the three parcels should be separately valued.

II

The District Court's Action on the Motion to Set Aside the Judgment Was Discretionary and No Abuse of Discretion Is Shown

A motion under Rule 60(b), F.R.Civ.P., cannot be a substitute for failure to file a motion for new trial within ten days after the entry of the judgment under Rule 59, but there must be some special grounds as specified in Rule 60(b). Cf. *City and County of Honolulu* v. *United States,* 224 F. 2d 573 (C.A. 9, 1955). None of the grounds therein specified are available to appellants, as they had ample time to produce the evidence in regard to the ownership of the property, and the newly discovered evidence claimed by them was available to them at the time of the trial.

Appellants' motion to set aside the judgment under Rule 60(b), F.R.Civ.P., is addressed to the discretion of the district court, and its decision will not be disturbed except for abuse of discretion. *Cole* v. *Fairview Development,* 226 F. 2d 175 (C.A. 9, 1955); *Perrin* v. *Aluminum Co. of America,* 197 F. 2d 254, 255 (C.A. 9, 1952); *Independence Lead Mines Co.* v. *Kingsbury,*

175 F. 2d 983, 988 (C.A. 9, 1949), cert. den. 338 U.S. 900. "The discretion is not an arbitrary one to be capriciously exercised, but a sound legal discretion guided by accepted legal principles." *Assman* v. *Fleming,* 159 F. 2d 332, 336 (C.A. 8, 1947). Here, there is no reason why the court should have granted the motion.

Appellants do not charge the trial court with an abuse of discretion, but ask this court to reverse the judgment and order a new trial, on the ground that through surprise, mistake and excusable neglect they were unable to show ownership as a partnership of the three parcels involved. In ruling upon the motion, the district court was faced with contradictory testimony given by Mr. Kolstad under oath. He was the first witness at the trial in January, and shortly after it commenced the following questions and answers were given on direct examination (R. 121-122):

> Q. This entire property that is exhibited here in your Defendants' Exhibit 1 that you have described to us and the manner in which you acquired it, is that operated as a family between yourself and your wife, or in what fashion do you operate?
>
> A. We operated it with the same unit. The boys —we operated it all in one unit, the 3,200 acres that are over east of that, and this acreage here (indicating).
>
> Q. You might explain what the ownership of your wife is, and your own ownership with respect to this 17,000-odd acres shown in Exhibit 1.
>
> A. Well, in the beginning in 1942, when I first bought it, we bought two ranches, as I testified to. My wife bought what was known as the Sailor

ranch, and I bought what was known as the Martin Wasesha ranch, so that she owns that in her right, and I own the other one as we purchased it, and the Turner ranch that we bought later, we bought it in joint tenancy.

Q. Well, substantially, without going into the exact details of it, then, your wife owns approximately half of the land and you own approximately half?

A. That is close enough.

Q. Some of it in joint tenancy and others individually owned by her and individually owned by you?

A. Yes.

Q. And while it is probably not important, but when you say that your wife bought one ranch, that was bought with her own money?

A. Yes, it was.

Q. It was actually her ranch?

A. Yes.

Q. It wasn't just a husband and wife deal where you had it deeded to her in her name?

A. No.

Q. Bought with her own money.

In his affidavit in support of his motion, Mr. Kolstad stated that the three parcels of land had been purchased with partnership funds, and that title to the Sailor Ranch "was taken in the name of Alta A. Kolstad but it was the intention of the parties that this ranch be owned by the partnership. The down payment for the Sailor Ranch and all subsequent payments were made from the joint checking account maintained by C. A. Kolstad and Alta A. Kolstad in the Citizens Bank of

Montana at Havre, Montana" (R. 37-40). This testimony, under oath, being exactly contrary to his former testimony at the trial, had to be resolved by the district court, as both statements could not be true.

In *Casey* v. *Northern Pac. Ry Co.,* 60 Mont. 56, 198 P. 141 (1921), the Supreme Court of Montana stated (p. 145): "It cannot be unfair to this plaintiff to deal with his case from the standpoint of his own statements. A party testifying in his own behalf has no right to be deliberately self-contradictory, and whenever he is so the courts are justified in judging his case from that version of his testimony which is least favorable to him." The district court was therefore justified in accepting as true Mr. Kolstad's testimony that the parcel in his wife's name was owned "in her right, and I own the other one as we purchased it, and the Turner ranch that we bought later, we bought it in joint tenancy" (R. 121), rather than his later testimony as to all of the parcels being owned as a partnership, the individual and joint tenancy ownerships being least favorable to him. "Generally speaking, there is a presumption that the ownership of real estate is where the muniment of title places it." *In Re Hunter's Estate,* 125 Mont. 315, 324, 236 P. 2d 94 (1951). In any event, if we are to believe Mr. Kolstad's second version rather than his first version, this information was in his knowledge and cannot be considered "newly discovered evidence" within Rule 60(b). No justification can be given for appellants' failure to present this during the recess, or at the beginning of the trial in January.

In their brief, appellants ignore the cases relied upon by the district court (R. 58-60), and rely upon cases which show a clear intention of the parties that the

properties involved were intended to be owned by the partnerships. Clearly, these cases do not support appellants' contentions on the facts of this case.

III

The Trial Court Correctly Refused to Set Aside the Judgment on the Ground of Newly Discovered Evidence Concerning the Testimony of Joe Meissner

As a further ground of their motion, appellants allege that since the entry of the judgment they have discovered new evidence (R. 35). They contend they were surprised by the testimony of the Government's witness Meissner as to the production of the land during the time he leased it (Br. 14-15). In his affidavit in support of the motion, Mr. Kolstad stated that Meissner testified that the yield per acre in 1952 was around 13 bushels and in 1953 it was 22 bushels, whereas his [Mr. Kolstad's] investigation reveals that it was 16 bushels in 1952 and 24 bushels in 1953. He asserts that these errors reduced the income from the lands by a little over $21,000, and would thus reduce the value of the lands.

Again, Mr. Kolstad has contradicted his own testimony. At the trial of the case, on direct examination the following took place (R. 169):

> Q. About what has been your average production per acre of seeded land on your ranch over the last 10 years, let us say?
>
> A. Well, I wouldn't go back quite 10 years because I haven't enough records, but I would say in the last seven or eight years, I have averaged 22 bushels on seeded acres.

Q. Now, you said over the last seven or eight years, and that is based upon—you mentioned the word "records," is that actually based upon records that you have kept?

A. Yes.

Q. And when you speak of records, what records are you referring to?

A. My farm records that I keep for income tax purposes showing the sales, and, of course, the record of the seeded acres can be gotten out of the allotment office.

Q. Now, this average of 22 bushels per acre, and that is seeded acres——

A. Yes.

Q. Does that take into account lean years when production wasn't so good and fat years?

A. It is an average of the years.

Q. And to be fair about it then, so that the jury will understand it, that 22 bushels per acre average, would mean that one-half of that amount, or 11 bushels per cultivated acre would be the average, is that right?

A. That's right.[3]

Meissner also testified that the yield in 1948 was 24 bushels, in 1949 and 1950 it was around 14 bushels, and in 1951 it was around 17 bushels. In view of the yield according to his testimony being higher than the average according to Mr. Kolstad, it is obvious that it could not have had any adverse effect on the jury's verdict. Indeed, the variation between 22 and 24 bushels an acre,

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[3] He had previously testified that they crop the land "every other year, summer fallow one year half of the acres, and have half of the acres into crop" (R. 158).

or 13 and 16 bushels an acre, is so small as to constitute simply quibbling over inconsequential matters.

Appellants' contention with regard to the testimony of Meissner as to his purchase of land from Brinkman (Br. 15-16) is not a proper ground for a motion under Rule 60(b) as newly discovered evidence. Meissner was cross-examined at length following his direct testimony (R. 464-474), but not one question was asked about that sale. Furthermore, Brinkman was in the room during the trial under subpoena from the Government (R. 49), and counsel for appellants had an opportunity to further rebut the testimony of Meissner. Cf. *Plaut* v. *Munford,* 188 F. 2d 543, 546 (C.A. 2, 1951). No attempt was made by the Government to conceal anything regarding the transaction, and it certainly was not the duty of the Government to "put Mr. Brinkman on the stand to verify Joe Meissner" as alleged by appellants (Br. 16). Such a statement is ridiculous.

It is thus clear that the district court did not abuse its discretion in denying appellants' motion, and this Court has stated that it has "no power to go beyond the question as to whether the district court violated its sound discretion." *Stafford* v. *Russell,* 220 F. 2d 853, 855 (1955).

IV

There is no Showing of Prejudice to Justify Reversal by This Court

Appellants seek to have this Court reverse the judgment and order a new trial for the valuation of the three parcels as a unit. However, there is no evidence in the record that appellants have been prejudiced because of the separate valuations of the parcels. They made

no offer of proof as to the amounts their witnesses would have testified to as the value of the combined parcels before and after the taking by the Government. This Court has stated repeatedly the general principle that a ruling rejecting testimony is not reversible in the absence of an offer of proof. *Fidelity & Deposit Co. of Maryland* v. *Lindholm,* 66 F. 2d 56, 60-61 (1933); *Sacramento Suburban Fruit Lands Co.* v. *Miller,* 36 F. 2d 922 (1929); *Romeo* v. *United States,* 24 F. 2d 527 (1928). The same rule was announced by the Supreme Court in *Origet* v. *Hedden,* 155 U.S. 228, 235 (1894); and *Herencia* v. *Guzman,* 219 U.S. 44, 46 (1910); and has been followed in other circuits: *Sorrels* v. *Alexander,* 142 F. 2d 769 (App. D.C. 1944); *McVeigh* v. *McGurren,* 117 F. 2d 672, 679 (C.A. 7, 1940), cert. den. 313 U.S. 573; *Downie* v. *Powers,* 193 F. 2d 760, 768 (C.A. 10, 1921); *Hoffman* v. *Palmer,* 129 F. 2d 976 (C.A. 2, 1942), affirmed 318 U.S.109.

The scope of review in a condemnation case is limited to errors of law, and as shown, *supra,* pp. 7-12, the case was tried on correct principles of law. The awards being within the range of the testimony, *supra,* p. 5, are supported by substantial evidence, and are, therefore, conclusive as to the facts on appeal. *Phillips* v. *United States,* 148 F. 2d 714, 716 (C.A. 2, 1945); *Seale* v. *United States,* 243 F. 2d 145 (C.A. 5, 1957); *Love* v. *United States,* 141 F. 2d 981, 982 (C.A. 8, 1944). An examination of the record plainly shows that the case was well and fairly tried, and there is no reversible error. *Chapman* v. *United States,* 169 F. 2d 641 (C.A. 10, 1948), cert. den. 335 U.S. 860. The grounds now urged to charge the district court with error are not only afterthoughts, but they are premised on contradic-

tion of facts stated under oath at the trial. A reversal is, we submit, plainly not warranted.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the district court should be affirmed.

Respectfully,

PERRY W. MORTON,
Assistant Attorney General.
KREST CYR,
United States Attorney,
Billings, Montana.
ROGER P. MARQUIS,
ELIZABETH DUDLEY,
Attorneys, Department of Justice,
Washington 25, D. C.

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